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(2)

No. 09-191

Supreme Court, U.S.
FILED
SEP 4 - 2009
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

J.W.,

*Petitioner,*

v.

THE HONORABLE DAVID W. KNIGHT, IN HIS OFFICIAL CAPACITY AS SENIOR STATUS JUDGE, CIRCUIT COURT OF MERCER COUNTY FOR THE STATE OF WEST VIRGINIA,

*Respondent,*

JASON WILSON,

*Real Party In Interest.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia**

## BRIEF IN OPPOSITION OF JASON WILSON, REAL PARTY IN INTEREST, TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED*

(1) Whether it violates the Supremacy Clause for a State Court to order a minor rape victim to submit to a penetrating pelvic examination, where the Court lacks constitutional authority to issue such an Order and the minor victim has a federal constitutional right to refuse to submit?

(2) Whether it violates the Due Process Clause for a State Court to order a child rape victim to submit to a penetrating pelvic examination at the behest of a criminal defendant?

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* There are obvious redundancies in the QUESTIONS PRESENTED posited by the Petitioner. Questions 1 and 2 are simply "different sides of the same coin." The issue is whether a State Court may ORDER a physical examination of a complaining witness in a rape prosecution after the accused has demonstrated a "compelling need" for the evidence. State Courts are empowered by West Virginia law to enter such Orders. Is there a conflicting federal right that preempts the State's prerogatives? That is the issue here. The Petitioner's formulation of Questions 1 and 2 already adjudge Jason Wilson guilty of the rape. There has been no Trial and no conviction and Mr. Wilson carries with him the presumption of innocence throughout these proceedings [*In Re: Winship*, 397 U.S. 358, 363 (1970)].

## PARTIES TO THE PROCEEDING

Jason Wilson is a criminal defendant in the action pending below. There are no parties affected by this Petition other than those identified in the Petition for a Writ of Certiorari.

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## STATEMENT OF THE CASE

Jason Wilson stands charged in the Circuit Court of Mercer County, West Virginia with four [4] counts of sexual assault in the first degree and one [1] count of incest. He faces 70-160 years in the West Virginia Penitentiary relating to allegations made by his younger sister, "J.W." [W.Va. Code § 61-8B-3; 61-8-12], if convicted.

Jason Wilson's court appointed counsel filed a Motion for Discovery in the Circuit Court of Mercer County requesting that "J.W.," now 15 years of age, undergo a physical examination by a Board certified female gynecologist for the purposes of determining whether there was any evidence of repeated traumatic sexual intercourse, as now alleged by the State of West Virginia. The request was made under the authority of the West Virginia Supreme Court of Appeals' decision in *State v. Delaney*, 417 S.E.2d 903 (W.Va. 1992), which invests the defendant with the right to discover such evidence and to have the Court order such an examination where the accused can satisfy the 6-factor "COMPELLING NEED test."

Jason Wilson had been inducted into the United States Army and was days away from completing basic training when he was arrested on an Indictment alleging four [4] counts of sexual assault and one [1] count of incest. The Indictment is based solely on the uncorroborated testimony of his younger sister, "J.W.," who is now 15 years of age. "J.W." has made allegations to the State of West Virginia's forensic

expert [a play therapist] that Jason had repeatedly and sometimes forcibly raped her from age 6 through 12. In her revised account, "J.W." indicated that the attacks began when the family lived in Arizona and continued through the family's many moves until they ended up living on Cumberland Road and Union Street in Bluefield, Mercer County, West Virginia.

"J.W.'s" description of what had occurred between her and her brother changed markedly from that she had revealed to other professionals before the referral to the State's forensic play therapist.

"J.W." was examined by Dr. Farid Hussainn, M.D., of the Prudich Medical Center in Montcalm, West Virginia on August 16, 2005. This examination was part of the Mercer County Board of Education's efforts to have "J.W." reintroduced to the formal education system over the objection of her father, who had been home-schooling the child. Part of the examination dealt with questions relating to whether she had ever been molested, abused or penetrated. Her responses to Dr. Hussainn were all in the negative.

"J.W." did evidence signs of Attention Deficit Disorder and she was referred to Lawrence Richmond, a licensed psychologist with Laurel Ridge Psychiatric Associates. During that evaluation, her father, who was present, first reported that she had told him that she had been sexually molested and abused by her brother, Jason, who had left the family and married, against the wishes of his father. The

evaluator recommended counseling by a female counselor, but "J.W.'s" father refused that option.

Mr. Richmond continued to see "J.W." over several visits, in a professional capacity, and "J.W." denied, during those examinations and treatment, that she had ever been sexually penetrated by her brother. She described several touching incidents by the accused, but specifically denied sexual penetration or intercourse. "J.W." also reported to the psychologist some abnormal behaviors within the family, including a female friend of the father who had told "J.W." that she would be raped and killed and chopped up in pieces at some point in her life [she was 7 at the time of this disclosure]. "J.W." also talked about witnessing this same female friend of her father's sexually molesting her then 12-year-old brother [Jason Wilson] when they were living in Arizona.

Psychologist Richmond was a mandatory reporter and made referral to the appropriate authorities. "J.W." was then interviewed by Sergeant Melissa Clemons of the West Virginia State Police on January 13, 2006. Sergeant Clemons specializes in investigating and prosecuting sexual offenses against children. During her interview of "J.W.," "J.W." specifically denied she had ever had sexual intercourse or ever been sexually penetrated by her brother, Jason Wilson. She reported several incidents of being touched inappropriately over the course of the families' many moves.

Jason Wilson eventually gave a statement to Sergeant Clemons. He admitted touching his sister and one incident of digital penetration of her when they were living on Union Street in Bluefield, West Virginia. Both "J.W." and Jason would have been under age during this time period. None of the other children reported ever witnessing any untoward behavior directed at "J.W." by either her father or by her brother, Jason Wilson.

No charges were brought against Jason Wilson based on these statements. The Indictment actually was brought two [2] years later after Jason Wilson was inducted into the United States Army and after "J.W." participated in "play therapy sessions" with Phyllis Hasty, who has been a member of the State's prosecution team for sexual molestation cases in Mercer County for some time.

It was well into those sessions, which occurred over many months, that "J.W." changed her accounts of her interactions with her brother and now alleged repeated sexual intercourse of a forcible and traumatic nature spanning six [6] years and encompassing activities in several States.

The State of West Virginia did not proceed against Jason Wilson based on "J.W.'s" report to either the psychologist or its investigator, Sergeant Clemons – an account that matched what Jason had stated happened in an independent statement he had given to Sergeant Clemons. Rather, the State indicted based on the revised accounts of "J.W." two years

later where she now alleged that she had been repeatedly and forcibly raped from age 6 through 12 by her brother.

Jason Wilson, through counsel, moved, under the authority of *State v. Delaney*, 417 S.E.2d 903 (W.Va. 1992), for an Order requiring a physical examination by a Court-designated, female gynecologist to determine whether hymen injury was present.

The Trial Court considered the age of the accuser, now age 15 [the child in *Delaney* was 7-8]; the limited nature of the exam; the fact that such exams are routinely done in sexual assault cases, often at the insistence of the Prosecution; and the fact that the literature shows no significant psychological damage or risk for young women in "J.W.'s" age group [age 15].

After weighing the *Delaney* factors, the Trial Court granted the defense's request, but established very strict guidelines to minimize the intrusion to "J.W.":

The examination would be limited to assessing hymen injury. It would be done by a female gynecologist approved by the Prosecution and scheduled by the Prosecution. The results would be submitted to the Trial Court for an *in camera* review. The results would only be disclosed if the Trial Court believed the results probative to a claim by the defense or an element of proof for the prosecution.

The Prosecuting Attorney sought a Writ of Prohibition with the West Virginia Supreme Court of

Appeals to prevent the physical examination from taking place. The State's application, after briefing and oral argument, was denied, with the Supreme Court of Appeals upholding the Trial Court's finding of "compelling need" for a physical examination of this 15-year-old female.

"J.W." is now challenging the West Virginia Supreme Court of Appeals' ORDER, raising for the first time before this Court, arguments that were never made either to the Trial Court or the Supreme Court. It is for this Court to determine whether the Constitutional issues now raised were so enmeshed with the arguments below they were effectively preserved. *Taylor v. Illinois*, 484 U.S. 400, 406 n. 9 (1988); *see, also, Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

## REASONS FOR DENYING THE WRIT

**(1) West Virginia fully protects the young woman's federal rights against an "unreasonable search" by requiring a showing of "compelling need" to the satisfaction of a judicial officer before a minor may be ordered to undergo a physical examination. This "compelling need" standard fully protects the only federal right at issue – namely, the Fourth Amendment protection against an unreasonable search.**

The United States Supreme Court has never ruled that physical examinations are per se

unconstitutional. The contrary is true! The Court has held that physical searches, physical examinations and even the removal of body fluids do not conflict with constitutional protections so long as the Fourth Amendment requirements are satisfied. *Schmerber v. California*, 384 U.S. 757 (1966). *See, also, Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 622 (1989); *United States v. Ward*, 131 F.3d 335 (3rd Cir. 1997) (the Violence Against Women's Act's provisions authorizing the forced HIV testing of inmates does not violate Fourth Amendment). The required constitutional limitations simply means that there must be a finding of probable cause by an independent judicial official in order to undertake "a search of a person" or to order physical examinations or other intrusions. *Id.*

Nor is testing limited to persons under reasonable suspicion of committing a crime. "Special needs" may arise beyond the normal needs of law enforcement that justify intrusive examinations. *See, Skinner*, 489 U.S. at 619.

West Virginia fully follows the requirements of the Fourth Amendment when it empowers judicial officers to compel minors to undergo either physical or psychological examinations.

West Virginia's Child Protective Services, by statute, may forcibly take children to a physician or hospital for necessary treatment, even over the objection of the parent or guardian of the child [W.Va. Code § 49-6-9]. To exercise this authority of forced

medical treatment over a child, the State must demonstrate probable cause upon application to a judicial authority that indicates the child is either in danger or his/her needs are being neglected or ignored.

The State of West Virginia additionally empowers its Courts, in investigations of sexual abuse, molestation or assault, to order a physical examination of a minor child to aid or assist in determining whether the abuse has occurred and to assist in advancing the prosecution of the abuser [W.Va. Code § 49-6-4(b)]. This power may only be exercised upon a showing of probable cause before a judicial officer who may, then, order the examination.

The notion that physical examinations of children is especially offensive to society's sensibilities or some specific provision of the United States Constitution is plainly wrong. Many times these examinations are undertaken for the purposes of protecting the minor or vindicating some societal interest in assuring abusers and attackers are identified and prosecuted. *See*, W.Va. Code §§ 49-6-4(b); 49-6-9; 49-6-10. West Virginia is free to include "protecting the due process rights of an accused under State law" among the reasons these examinations will be permitted. *Cf., Malloy v. Hogan*, 84 S. Ct. 1489 (1964); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (W.Va. 2000) (State may provide greater protections to an accused than required by the United States Constitution).

Even though the intrusion on the child being examined is the same – no matter the applicant – the State of West Virginia strictly and stringently limits the circumstances in which a criminal defendant may obtain a Court Order requiring a physical examination of a minor. The lesser "probable cause" standard when the State is the applicant has been discarded. Instead, the State requires the defendant to show "compelling need" under the 6-factor test the Supreme Court of Appeals outlined in *State v. Delaney*, 417 S.E.2d 903. In the case at bar, not only did an independent judicial officer in the form of the Trial Judge rule that the defendant had met the burden of showing "compelling need," but the West Virginia Supreme Court of Appeals affirmed the decision after full briefing and oral argument.

*Schmerber* requires a demonstration of probable cause before a physical examination may be ordered to vindicate the examinee's Fourth Amendment rights. The more demanding "compelling need test" imposes upon the criminal defendant a far greater burden of persuasion than the State of West Virginia requires of itself when it or its agencies is the applicant for such a test and more than satisfies *Schmerber's* requirements. To prevail on a Supremacy Clause challenge, "J.W." must first identify what federal right and State Enactment are in conflict. *Perez v. Campbell*, 402 U.S. 637, 644 (1971). She has failed this threshold requirement.

**(2) The State of West Virginia reserves to itself the authority to order physical examinations of rape victims upon a showing of probable cause. The State extends this right to a criminal defendant in extremely limited circumstances where it is determined to the satisfaction of judicial authority that there is a "compelling need" for such an examination. The State of West Virginia is free to confer upon a defendant greater discovery rights under its own rules and own Constitution than that available to a criminal defendant under the United States Constitution.**

West Virginia is not alone in permitting, in certain circumstances, the defendant to be the initiator of a request for a physical examination of a complaining witness. *See, e.g., State v. McIntosh*, 58 P.3d 716 (Ks. 2002); *State v. Barone*, 852 S.W.2d 216 (Tn. 1993); *State v. Ramos*, 553 A.2d 1059 (R.I. 1989); *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1988); *State v. Garrett*, 384 N.W.2d 617 (Mn. 1986); *State v. Drab*, 546 So.2d 54 (Fl. App. 1989); *People v. Nokes*, 228 Cal. Rptr. 119 (1986); *State v. Hewett*, 376 S.E.2d 467, 472 (N.C. 1989). State Courts have adopted a number of approaches to determine whether and under what circumstances an accused sex offender may be entitled to a physical examination of his accuser. Some States apply the "material assistance inquiry" which requires a physical examination when it could lead to evidence of material assistance to the defendant. *See, Turner v. Commonwealth*, 767 S.W.2d

557 (Ky. 1988). The most common approach is that followed by West Virginia, namely, the "compelling need" inquiry, which basically balances the defendant's interest in the evidence against the burden of the examination imposed upon the complainant. *State v. Delaney, supra*; *People v. Glover*, 273 N.E.2d 367 (Ill. 1971); *State v. Garrett*, 384 N.W.2d 617 (Mn. App. Ct. 1986); *People v. Wheeler*, 575 N.E.2d 1326 (Ill. 1991); *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003). Still other States permit an examination under a "medically-deficient standard" which permits an examination only if the Prosecutor's examination failed to conform to proper medical procedures. *State v. Drab*, 546 So.2d 54 (Fl. App. 1989). At least one Court has applied a strict *Brady v. Maryland*, 373 U.S. 83 (1963) standard, meaning the defendant would be entitled to the examination only when the evidence likely to be obtained from such an examination would absolutely bar his conviction. *See, e.g., People v. Nokes*, 228 Cal. Rptr. 119 (1986).

Some other States have held that there are no circumstances in which a criminal defendant could ever obtain an Order requiring a victim to submit to a physical examination, *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 144-45 (Tx. App. Ct. 1987); *People v. Lopez*, 800 N.E.2d 1211 (Ill. 2003); *Clark v. Commonwealth*, 551 S.E.2d 642 (Va. 2001), absent some direct legislative authority. *Id.*

The "federal interest" in State-ordered physical examinations is limited to the Fourth Amendment concerns relating to an unreasonable search. *See, e.g.*,

*Schmerber, supra.* The States are experimenting with various approaches to the issue – which is both the genius and sometimes frustration of the Federal System envisioned by the Founders. Some defendants have a right to discover and verify the medical evidence against them and others, in different jurisdictions, do not. A fair Trial, consequently, may mean different things in the several States even though the accused's conduct is the same.

The States' experimentations in this field, however, have always applied standards that honor the constitutional protection of the person being examined against unreasonable search. All the States that are permitting such examinations require a showing to the satisfaction of a judicial officer under standards that are at least as strict and most of the time far more strict than the probable cause standard that forms the heart of the protection outlined in the Fourth Amendment.

The fact that the United States Constitution may not provide Jason Wilson a right to insist upon a physical examination of his accuser does not eliminate the State of West Virginia's power to honor such a request and set standards for such a request. Typically, the operation of the System of Criminal Justice within a State is left to the prerogative of the State so long as the minimum requirements of the United States Constitution are satisfied. The United States Supreme Court has consistently held that Congress cannot reach matters constitutionally reserved to local authorities. The regulation and

punishment of intra-State violence has always, in our Federal System, been the province of the States. *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The provisions of State law or the State Constitution may, in certain circumstances, provide higher standards of protection for the accused than afforded by the United States Constitution. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121 (1959). *See, also, Syl. Pt. 1, State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (W.Va. 2000); *Syl. Pt. 2, Pauley v. Kelley*, 162 W.Va. 672, 255 S.E.2d 859 (1979); *see, also, People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 828 (1992).

West Virginia, like many other States, has decided that, in very limited circumstances, a defendant may initiate a request for a Court Order requiring a medical examination of his accuser. This "right" of medical examination may not exist under the United States Constitution, but it is certainly within the power of the State to confer such a benefit upon a criminal defendant facing 70-160 years in prison. *Id.*

The limitation on the State's authority to order such an examination only implicates a federal concern when the Fourth Amendment protection against unreasonable searches is trespassed.[1] No such

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[1] A different issue is presented by what happens when an adult, exercising independent judgment, refuses the Order to undergo an examination. This may implicate a different set of concerns or constitutional considerations that are not present

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boundaries were violated by the Supreme Court of West Virginia's decision to authorize an examination in the case of "J.W."

"J.W." is 15 years old. She is in the category of young women who should be undergoing regular gynecological examinations under standards enunciated by the American College of Obstetrics & Gynecologists. The examination is to be done by a Board certified female gynecologist in conformance with all medical protocols. The type of examination undertaken is one universally experienced by women in America whether they are victims of sexual assault or simply undergoing routine periodic medical examinations. The results of the examination are disclosed only to the judicial officer who authorized

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here. The Legislature of the State of West Virginia has stated, in a related context, that a refusal to undergo a physical examination should not result in a "contempt finding." [W.Va. Code § 49-6-4(a)]. Courts that have confronted the issue have fashioned remedies short of actually punishing the person refusing the examination and preferring, instead, to make evidentiary adjustments that balance the playing field, such as striking portions of the State's case that involve the claim of sexual intercourse. *See, People v. Wheeler, supra.* What "might happen" to an individual who refuses a Court Order requiring a medical examination in the context of this type of case does not present a justiciable issue at this point. The Ripeness Doctrine is designed "to prevent the Courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . ." The Ripeness Doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise that jurisdiction. *Reno v. Catholic Services, Inc.*, 509 U.S. 43, 57 n. 18 (1993).

the test, *in camera,* and will only be released if the examination reveals evidence that is probative on an element of the State's case or a claim of defense by the accused. Finally, the psychological evidence presented to the Trial Court showed that the fears of mental damage in "J.W.'s" age group are unfounded.

One may argue allowing medical examinations is not sound policy. That is a fair issue for debate. But the judicial process is not the system in which policy is established. This Court's sole concern is whether there has been a violation of a specific and articulated federal right by the Order of the highest Court of West Virginia requiring a physical examination. The answer is in the negative. The "compelling need" test applied by the Trial Court and affirmed by the West Virginia Supreme Court of Appeals more than satisfies any federal concern about an unreasonable search. The State of West Virginia's highest Court has authorized the examination and, even though the defendant may not have had a right to insist upon that examination under the United States Constitution, the State of West Virginia was free to grant him greater protection than that afforded by the Federal Constitution before subjecting him to a lengthy term of imprisonment in its prisons.

**(3) West Virginia's decision to order a physical examination of a 15-year-old by a Board certified female gynecologist does not conflict with any articulated federal policy and, instead, actually advances a federal preference for forensic medical evaluations in cases of sexual abuse or sexual assault.**

There was nothing sinister or inherently dangerous about the examination ordered by the Trial Court in the case of "J.W." She is 15. The psychological evidence introduced for the Trial Court indicates that females who undergo gynecological examinations in this age group had no permanent, untoward, psychological effects. The examination, moreover, was to be done in accordance with all medical standards by a Board certified gynecologist, selected by the State of West Virginia. The report of the examination is to be given only to the Trial Court so it can assess and determine whether the results of the examination are probative to any issue or element of proof required of the State or any claim of defense of the accused. There will be no tissue samples taken; no blood drawn; and no invasive procedures outside the normal gynecological examination that are almost routinely and universally undergone by sexual assault victims and non-sexual assault female members of our community over their lifetime.[2]

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[2] The American College of Obstetricians & Gynecologists recommend that young women, beginning at age 13-15, undergo

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The Supremacy Clause of the United States Constitution, Article IV, Section 2, has not been violated by the Order of the West Virginia Supreme Court of Appeals requiring the Prosecutor to undertake a physical examination of the complaining witness in this rape prosecution. There simply is no conflicting federal statute or policy that prohibits such examinations. *See, Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (standards articulated for when preemption is required). The Violence Against Women's Act of 1994 [VAWA][3] actually is designed to encourage, not discourage, forensic medical evaluations of sexual assault victims for the purposes of strengthening their position in Court. The VAWA accomplishes this by providing the States with a set of incentives so that those States will enact laws that authorize enhanced training for medical providers in performing forensic medical examinations of sexual assault victims, including children, and for providing

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pelvic examinations. This same entity also has a hard and fast rule that sexually active females should have pap smears within three [3] years of the time intercourse was first experienced. "J.W." indicates that she first experienced intercourse at age 6. She is now age 15 and by the admission of the prosecution, her family has never had her physically examined for injury, venereal disease or any of the risk factors for cancer of the cervix.

[3] Pub. L. 103-322, 108 Stat. 1902 (1994). The United States Justice Department, in implementing VAWA, awards STOP [Services, Training, Officers, Prosecution] grants to the States. Among the preconditions for the receipt of the monies is a guarantee the State has a Program of providing free forensic medical examinations to all alleged victims.

funding sources so that these forensic medical evaluations can go forward.

West Virginia is among those States that has enacted provisions implementing the federal policy enunciated in the VAWA. The State has created a training program for medical personnel to educate them as to the method and means of undertaking forensic medical evaluations of alleged victims of sexual assault or sexual abuse. The State furthermore has imposed upon the Prosecuting Attorneys' Institute a mandatory duty to pay for all forensic medical evaluations in cases where sexual assault is suspected or claimed [W.Va. Code § 61-8B-15, 16]. The enunciated federal policy is to encourage forensic medical examination as a method and means of taking these cases out of the iffy "he said/she said sphere"[4] and providing corroborative medical evidence. These interests are actually advanced by the Trial Court's ORDER at issue here.

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[4] A "he said/she said" case carries a substantial risk of error. A well-spoken, composed person may be telling a lie. An inarticulate, frightened witness may be telling the truth, yet come across as incredible. Forensic medical evidence serves the truth-finding mission of the jury and removes the specter that justice will be decided based on the vagaries of the better performer.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this the 20th day of September, 2009.

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